

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:04CR3140
)	
Plaintiff,)	MEMORANDUM
v.)	AND ORDER
)	
JOSEPH W. MONDAY,)	
)	
Defendant.)	

This matter is before the court on the defendant's notice of appeal (filing 130) and the clerk's recent memo (filing 131) asking whether the defendant may proceed in forma pauperis and whether a certificate of appealability will issue. The pro se notice of appeal is filed with reference to the judgment entered on April 15, 2008 (filing 129), which denied the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

Before the defendant's appeal can proceed, a certificate of appealability must issue. *See* Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

For the reasons set forth in the memorandum and order that was entered on April 15, 2008 (filing 128), granting the government's motion for summary judgment and denying the defendant's motion for leave to amend, the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). Therefore, a certificate of appealability will not be issued.

The defendant was determined to be financially unable to obtain an adequate defense in his criminal case, and an attorney was appointed to represent him at trial. Because the appeal appears to be taken in good faith, even though a certificate of appealability will not be issued, the defendant may proceed in forma pauperis on appeal pursuant to Federal Rule of Appellate Procedure 24(a)(3).

IT IS ORDERED that:

1. A certificate of appealability will not issue in this case.
2. The defendant may proceed in forma pauperis on appeal.
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

May 1, 2008.

BY THE COURT:

s/ Richard G. Kopf
United States District Judge